No. 84-1244

IN THE

Supreme Court of the United States

October Term, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

vs.

IRWIN C. BANDEMER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO EXPEDITE CONSIDERATION

---

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April, 1985

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO EXPEDITE CONSIDERATION

Appellants, by counsel, respectfully move the Court for an order advancing oral argument in this cause so that it may be heard during the 1984 Term, and to expedite consideration of this case so that a decision may be rendered prior to the end of 1984 Term. In support of their motion, Appellants respectfully state that:

1. This appeal is taken from an order of the United States District Court for the Southern District of Indiana, sitting as a three-judge court, entered on December 13, 1984, which (a) declared unconstitutional under the Equal

Protection clause of the Fourteenth Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (b) enjoined the Indiana state officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto in 1986 and thereafter; and (c) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the state and reapportion the legislative seats in the General Assembly. The decision was based solely upon a finding of partisan political gerrymandering and relied principally on the concurring opinion of Justice Stevens in *Karcher v. Daggett*, 462 U.S. 725 (1983) (Stevens, J., concurring). A copy of the decision and order appears in Appendix A to Appellants' Jurisdictional Statement.

2. On December 18, 1984, Appellants asked the court below to clarify its order in certain specific respects, including what priority to assign to its new constitutional prohibition against partisan political gerrymandering, which conflicts in certain important aspects with the priority of the Indiana General Assembly to preserve Black voting strength. The lower court denied this request on December 27, 1984. Copies of this motion and order appear at Appendices C and D, respectively, in the Jurisdictional Statement.

3. Appellants thereafter filed a Notice of Appeal in the lower court, and on March 25, 1985 this Court noted probable jurisdiction of the appeal.

4. On February 7, 1984, Appellants filed with this Court a Motion to Expedite Consideration, requesting the Court to expedite notation of probable jurisdiction and moving for an order advancing oral argument and setting an expedited briefing schedule. On February 19, 1985, the Court denied that portion of the motion which requested expedited consideration of the Jurisdictional Statement.

5. On April 5, 1985, Appellants filed with the court below a motion to stay the effect of the December 13, 1984 order pending resolution of this appeal. The court below has failed to act on that motion to date. A copy of the motion is attached as Exhibit A.

6. In order to facilitate expedited oral argument and disposition of this appeal, Appellants are undertaking to file with the Court within the next two weeks their Brief on the merits, which pursuant to Rule 35.1 is not due until May 9, 1985. Thus, even if the time within which Appellees must file their brief is not expedited by the Court, argument of this appeal may still be heard this Term should the Court agree to expedite this matter. Counsel for Appellants has previously submitted to the Court a letter, a copy of which is attached as Exhibit B, requesting on behalf of Appellants and Appellees Bandemer, *et al.* the earliest possible oral argument in this case. Counsel for Appellees Bandemer, *et al.* previously submitted a letter dated February 11, 1985 to the Clerk of this Court stating in its final paragraph that Appellees "have no objection to setting an expedited briefing schedule allowing this case to be heard during the current term." Appellants are also this day filing with Mr. Justice Stevens, as Circuit Justice for the Seventh Judicial Circuit, an Application for Stay in the event the Court does not wish to expedite this case. A copy of the Application (without exhibits) is attached as Exhibit C.

7. As discussed at greater length in the Jurisdictional Statement and Appellants' Brief on the merits, there is a reasonable probability that this Court will reverse and vacate the decision of the court below, which attempted to make new law in recognizing as justiciable a claim of partisan political gerrymandering and in upholding that claim on the record presented. *See, e.g., Wiser v. Hughes*, 459 U.S. 962 (1982) (dismissing for want of a substantial federal question an appeal alleging political gerrymandering); *Karcher v. Daggett*, 462 U.S. 725 (1983) (Stevens, J., concurring) (suggesting the necessary

showing for any such gerrymandering claim). In fact, the court below recognized the novelty of its holding (Appendix to Jurisdictional Statement, at A-21, A-22). That holding, and this Court's review of it, could have a substantial effect on reapportionment and elections throughout the United States to which the Equal Protection Clause has been held to apply. *See Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 n. 11 (1977) (county government election); *Hadley v. Junior College District of Kansas City*, 397 U.S. 50 (1970) (elected junior college trustees); *Avery v. Midland County*, 390 U.S. 474 (1968) (elected county commissioners). As the primary and general elections of 1986 approach, an expedited decision becomes increasingly important.

8. The effect of the lower court's decision and this Court's timetable in reviewing it are especially acute with respect to Indiana. Because of this continuing litigation, great confusion and uncertainty exists in the minds of Indiana voters and members of the General Assembly regarding the validity of Indiana's reapportionment acts and the future configuration of the electoral districts in which state senators and representatives and their challengers will be campaigning and in which the general public will be voting in 1986.

9. Moreover, Article 4, Section 7 of the Indiana Constitution requires Senators and Representatives to live in their districts for one year preceding their election:

> No person shall be a Senator or a Representative, who, at the time of his election, is not a citizen of the United States; nor any one who has not been for two years next preceding his election, an inhabitant of this State, and, for one year next preceding his election, an inhabitant of the district whence he may be chosen. Senators shall be at least twenty-five, and Representatives at least twenty-one years of age.

Thus, absent a stay of the lower court's order, if this Court does not resolve this appeal during this Term, grave

questions could arise regarding the effect of this state constitutional provision on the validity of any electoral districts which might have to be created less than one year from the November, 1986 elections.

10. Absent a stay of the lower court's injunctive order, Appellants respectfully state that they must have a decision on the merits of this appeal during this Term. By memorandum dated March 25, 1985, the Clerk of this Court has advised counsel that unless expedited by the Court, this case will probably be heard in the October Term, 1985. Counsel have been informally advised by telephone that oral argument will likely be scheduled for the month of October. The probability thus exists that unless expedited, this appeal may not be decided in time to allow the Indiana General Assembly to act, if necessary, pursuant to the Court's guidance before the May 6, 1986 primary or February 5, 1986, the first day to file declarations of candidacy for the 1986 primary election (Ind. Code §§3-1-9-4,5).[1]

11. Members of this Court have previously recognized the emergency nature of judicial review in cases involving election laws, *e.g. Shub v. Simpson*, 340 U.S. 861 (1950) (Vinson, C.J., Black and Douglas, J.J., dissenting); *MacDougall v. Green*, 335 U.S. 281 (1948) (Rutledge, J., concurring), and consideration of such cases has been expedited, *e.g., Williams v. Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers). Such concerns are equally applicable to this case.

---

[1] The Indiana General Assembly is a citizen legislature which is only in session for a limited period of time each year. In odd-numbered years it meets in regular session for a maximum of 61 session days, beginning in January and ending no later than April 30. Ind. Code §2-2.1-1-2. In even-numbered years it meets in regular session for a maximum of 30 session days. Ind. Code §2-2.1-1-3.

12. If the Court does not expedite oral argument and consideration of the pending appeal, the Indiana legislature will be forced by the lower court's order to create new legislative districts before the end of the year (*see* Jurisdictional Statement Appendix at A-33). As pointed out by Judge Pell in his dissenting opinion regarding the Motion to Amend, it will be difficult for the Indiana legislature "to discern what [the lower court's] opinion is saying should be done" (Jurisdictional Statement Appendix at A-64) and to draw new districts without, for example, diluting the votes of Indiana's Black voters (*see* Juridisctional Statement Appendix at A-59). Moreover, after new election machinery and districts were in place, a subsequent decision by the Court upholding the present apportionment acts would create chaotic confusion to Indiana voters and unfairness to political candidates or officeholders.

13. In *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers) Justice Brennan concluded that the state would suffer irreparable harm from a forced redistricting pending appeal:

> As to the third Rostker requirement, I conclude that applicants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect that the District Court will implement its own redistricting plan. With respect to the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans.
>
> *Id.* at 1306-07.

Similarly, Indiana would suffer the harm recognized by Justice Brennan were the General Assembly forced to adopt an alternative redistricting plan prior to the decision by the Court on this appeal.

WHEREFORE, Appellants, by counsel, respectfully move the Court for an order advancing oral argument in this cause so that it may be heard during the 1984 Term, and to expedite consideration of this case so that a decision may be rendered prior to the end of the 1984 Term.

Respectfully submitted,

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**Counsel of Record for Appellants*

Of Counsel:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IRWIN C. BANDEMER, et al., Plaintiffs, v. SUSAN J. DAVIS, et al., Defendants.	CAUSE NO. IP 82-56-C
INDIANA N.A.A.C.P. STATE CONFERENCE OF BRANCHES, et al, Plaintiffs, v. ROBERT D. ORR, Governor, State of Indiana, et al., Defendants.	CAUSE NO. IP 82-164-C

MOTION FOR STAY PENDING APPEAL

Defendants, Susan J. Davis, John Livengood, and Thomas S. Milligan, as members of the Indiana State Election Board, Laurie Potter Christie, as Executive Director of the Indiana State Election Board, and Edwin J. Simcox, Secretary of State of the State of Indiana, by counsel, move the Court pursuant to Rule 62(c), Federal Rules of Civil Procedure, for entry of an

EXHIBIT A

order staying the effectiveness of this Court's order of December 13, 1984 pending appeal of the order to the United States Supreme Court. In support of their motion, Defendants respectfully state that:

1. On December 13, 1984 this Court entered an order which (a) declared unconstitutional under the Equal Protection clause of the Fourteenth Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (b) enjoined the Indiana State officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto in 1986 and thereafter; and (c) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the state and reapportion the legislative seats in the General Assembly.

2. Defendants thereafter filed a notice of appeal with this Court, and on March 25, 1985, the United States Supreme Court noted probable jurisdiction of the appeal.

3. Rule 62(c), Federal Rules of Civil Procedure, permits this Court to suspend the operation of its injunction entered December 13, 1984 during the pendency of the appeal. Prior cases have established four considerations for entry of such a stay. An applicant must show (i) some likelihood that he will prevail on appeal, (ii) the possibility of irreparable

injury from denial of a stay, (iii) the absence of harm to the opposing party from entry of a stay, and (iv) that a stay is in the public interest. E.g., Adams v. Walker, 488 F.2d 164 (7th Cir. 1973). These factors do not, however, provide a mechanistic formula since the grant of a stay is within the discretion of the court. E.g. Jordan v. Wolke, 463 F.Supp. 641 (E.D. Wis. 1978).

4. In this Court's opinion, it recognized that in holding Indiana's reapportionment acts unconstitutional on the basis of partisan political gerrymandering, it was making new law in recognizing as justiciable a claim of partisan political gerrymandering and in upholding that claim on the record presented. In fact, this Court correctly stated that the Supreme Court had not yet approved such a claim and that no apportionment plan had ever been found unconstitutional because it discriminated against a political group. The Supreme Court has, however, dismissed for want of a substantial question, an appeal alleging political gerrymandering, Wiser v. Hughes, 459 U.S. 962 (1982), and has affirmed decisions holding such claims nonjusticiable, e.g., WMCA, Inc. v. Lomenzo, 238 F.Supp. 916 (S.D.N.Y. 1965), aff'd, 382 U.S. 4 (1965). By noting probable jurisdiction of the Defendants' appeal in this case, the Supreme Court is signaling that there is at least a fair possibility that Defendants will be successful on the merits of their appeal. Indeed, a stay is justified simply by the lack

of precedent for such a constitutional decision which could affect the state's political processes. See Republican State Central Committee v. Ripon Society, Inc., 409 U.S. 1222 (1972) (Rehnquist, J., in chambers).

5. The denial of a stay could cause irreparable harm to citizens of the State of Indiana if the United States Supreme Court is unable to decide this appeal on an expedited basis. Because of this continuing litigation, great confusion and uncertainty exists in the minds of Indiana voters and members of the General Assembly regarding the validity of Indiana's apportionment acts and the future configuration of the electoral districts in which state senators and representatives and their challengers will be campaigning and in which the general public will be voting in 1986. In addition, Article 4, Section 7 of the Indiana Constitution requires senators and representatives to live in their districts for one year preceding their election:

> No person shall be a Senator or a Representative, who, at the time of his election, is not a citizen of the United States; nor any one who has not been for two years next preceding his election, an inhabitant of this State, and, for one year next preceding his election, an inhabitant of the district whence he may be chosen. Senators shall be at least twenty-five, and Representatives at least twenty-one years of age.

Thus, if this Court's order is not stayed and the appeal is not resolved by the Supreme Court during its current term, grave questions could arise regarding the effect of this state

constitutional provision on the validity of any electoral districts which might have to be created less than one year from the November, 1986 elections.

6. By memorandum dated March 25, 1985, the Clerk of the Supreme Court advised counsel that unless expedited by the Supreme Court, this appeal will probably be heard in the October Term, 1985. Counsel has been informally advised by telephone that oral argument will likely be scheduled for the month of October. The possibility thus exists that unless expedited, the appeal may not be decided in time to allow the Indiana General Assembly to act, if necessary, pursuant to the Supreme Court's guidance even before the May 6, 1986 primary or February 5, 1986, the first day to file declarations of candidacy for the 1986 primary election (Ind. Code §§3-1-9-4,5).

7. Members of the Supreme Court have previously recognized the irreparable harm which can occur absent a stay in cases involving elections and the political process. In Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers) Justice Brennan concluded that the state would suffer irreparable harm from a forced redistricting pending appeal:

> As to the third Rostker requirement, I conclude that applicants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect that the District Court will implement its own redistricting plan. With respect to the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans.
>
> Id. at 1306-07

Similarly, Indiana would suffer the harm recognized by Justice Brennan were the General Assembly forced to adopt an alternative redistricting plan prior to the decision by the Supreme Court on the appeal.

8. Plaintiffs will suffer no harm from entry of a stay in this case. Justice Powell has pointed out that merely "prolonging" a remedy such as that sought and obtained by Plaintiffs in this case is not a basis to deny a stay. Wise v. Lipscomb, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers). Significantly, this Court allowed the November, 1984 general elections to proceed under the current apportionment acts, and the Supreme Court has approved the interim use of apportionment acts found invalid to avoid disruption of the election process. See, e.g., Reynolds v. Sims, 377 U.S. 533, 585 (1964).

9. On the other hand, the public has a considerable interest in allowing the plan of apportionment formulated by their elected representatives to remain in effect pending the appeal, Gaffney v. Cummings, 412 U.S. 735 (1973); Burns v. Richardson, 384 U.S. 73 (1966), and in allowing the state's political process to function free of judicial supervision, O'Brien v. Brown, 409 U.S. 1 (1972). Additionally, of course, the public has a substantial interest in alleviating the confusion and uncertainty which exists regarding the 1986 election.

WHEREFORE, Defendants respectfully move this Court pursuant to Rule 62(c), Federal Rules of Civil Procedure, for

entry of a stay suspending the operation of this Court's December 13, 1984 injunction pending the disposition of the appeal to the United States Supreme Court.

Respectfully submitted,

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Counsel for Defendants

OF COUNSEL:

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Attorney General of Indiana
Michael T. Schaefer,
Deputy Attorney General
Office of the Attorney General
State House, Room 219
Indianapolis, Indiana 46204

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Motion for Stay Pending Appeal" has been served upon Theodore R. Boehm, Esq., Christopher G. Scanlon, Esq., and John B. Swarbrick, Jr., Esq., 810 Fletcher Trust Building, Indianapolis, Indiana, 46204; Dennis C. Hayes, Esq., 36 South Pennsylvania, Suite 450,

Indianapolis, Indiana, 46204, by personal service and upon Thomas I. Atkins, Esq. and Michael H. Sussman, Esq., 186 Remsen Street, Brooklyn, New York, 11201 by Federal Express mail this 5th day of April, 1985.

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COUNSEL
KENNETH R. BARKER

March 29, 1985

Office of the Clerk
United States Supreme Court
One First Street, N.W.
Washington, D.C. 20543

Attention: Ms. Sandy Nelson

Re: Davis v. Bandemer
Cause No. 84-1244

Dear Ms. Nelson:

This letter is to confirm the substance of the recent telephone conversations you have had with the writer and Mr. Scanlon.

As explained to you in these conversations, Davis v. Bandemer is a case involving the legislative districting of the State of Indiana. Because disposition of the case by the Court may effect the districts under which elections are held in 1986, counsel for both appellees Bandemer, et al. and counsel for appellants Davis, et al. are anxious that the case be scheduled for argument at the earliest possible date.

Mr. Scanlon and I appreciate very much whatever consideration you are able to give to our scheduling request.

Sincerely,

William M. Evans
Counsel for Appellants
Davis, et al.

WME/dbg
cc: Christopher G. Scanlon, Esq.
One of the Attorneys for
Appellees Bandemer, et al.

EXHIBIT B

No. 84-1244

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

Susan J. Davis, et al.,

Appellants

vs.

Irwin C. Bandemer, et al.,

Appellees.

ON APPEAL FROM A THREE-JUDGE PANEL
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

APPLICATION FOR STAY

To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Judicial Circuit:

Appellants, by counsel, respectfully apply pursuant to Supreme Court Rule 44 for an order staying the December 13, 1984 order of the three-judge panel in the Southern District of Indiana pending a final disposition of the appeal to this Court, in the event this Court does not expedite consideration of this appeal as prayed in the Motion to Expedite Consideration contemporaneously filed with this Court. In support of their application, Appellants respectfully state that:

1. This appeal is taken from an order of the United States District Court for the Southern District of Indiana, sitting as a three-judge court, entered on December 13, 1984,

EXHIBIT C

which (a) declared unconstitutional under the Equal Protection clause of the Fourteenth Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (b) enjoined the Indiana state officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto in 1986 and thereafter; and (c) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the state and reapportion the legislative seats in the General Assembly. The decision was based solely upon a finding of partisan political gerrymandering and relied principally on the concurring opinion in Karcher v. Daggett, 462 U.S. 725 (1983) (Stevens, J., concurring). A copy of the decision and order is attached hereto as Exhibit "A" and also appears in Appendix A to Appellants' Jurisdictional Statement.

2. On December 18, 1984, Appellants asked the court below to clarify its order in certain specific respects, including what priority to assign to its new constitutional prohibition against partisan political gerrymandering, which conflicts in certain important aspects with the priority of the Indiana General Assembly to preserve Black voting strength. The lower court denied this request on December 27, 1984. Copies of this motion and order appear at Appendices C and D, respectively, in the Jurisdictional Statement.

3. Appellants thereafter filed a Notice of Appeal in the lower court, and on March 25, 1985 this Court noted probable jurisdiction of the appeal.

4. On February 7, 1984, Appellants filed with this Court a Motion to Expedite Consideration, requesting the Court to expedite notation of probable jurisdiction and moving for an order advancing oral argument and setting an expedited briefing

schedule. On February 19, 1985, the Court denied that portion of the motion which requested expedited consideration of the Jurisdictional Statement.

5. On April 5, 1985, Appellants filed with the court below a motion to stay the effect of the December 13, 1984 order pending resolution of this appeal. The court below has failed to act on that motion to date. A copy of the motion is attached as Exhibit "B".

6. In order to facilitate expedited consideration and disposition of this appeal, Appellants are contemporaneously filing with the Court a Motion for Expedited Consideration and undertaking to file early their Brief on the merits. Counsel have previously submitted to the Court a letter requesting the earliest possible oral argument on this case. Copies of the Motion for Expedited Consideration and the letter of counsel are attached as Exhibits "C" and "D", respectively.

7. Prior cases from this Court have established a four-part test for entry of a stay. An applicant must show (i) there is a reasonable probability that the case will be accepted for review, (ii) there is a fair prospect that the Court will conclude the decision below was erroneous, (iii) irreparable harm is likely to result from denial of a stay, and (iv) in a close case, the equities, including the interests of the public at large, favor a stay. Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers); Rostker v. Goldberg, 448 U.S. 1306 (1980) (Brennan, J., in chambers).

8. Probable jurisdiction of this appeal has previously been noted, thus satisfying the first part of the test, and Justice Brennan has recognized that a necessary overlap exists between the first two parts of the test. Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers). Moreover, as discussed at greater length in the Jurisdictional Statement and

Appellants' Brief on the merits, there is a reasonable probability this Court will reverse and vacate the decision of the court below, which attempted to make new law in recognizing as justiciable a claim of partisan political gerrymandering and in upholding that claim on the record presented. See, e.g., Wiser v. Hughes, 459 U.S. 962 (1982) (dismissing for want of a substantial federal question an appeal alleging political gerrymandering); Karcher v. Daggett, 462 U.S. 725 (1983) (Stevens, J., concurring) (suggesting the necessary showing for any such gerrymandering claim). The lack of precedent for constitutional decisions in the political arena has previously justified entry of a stay. Republican State Central Committee v. The Ripon Society, Inc., 409 U.S. 1222 (1972) (Rehnquist, J., in chambers); O'Brien v. Brown, 409 U.S. 1 (1972).

9. If Appellants' Motion for Expedited Consideration is not granted, the denial of a stay would cause irreparable harm to citizens of the State of Indiana. Because of this continuing litigation, great confusion and uncertainty exists in the minds of Indiana voters and members of the General Assembly regarding the validity of Indiana's apportionment acts and the future configuration of the electoral districts in which state senators and representatives and their challengers will be campaigning and in which the general public will be voting in 1986.

10. Moreover, Article 4, Section 7 of the Indiana Constitution requires Senators and Representatives to live in their districts for one year preceding their election:

> No person shall be a Senator or a Representative, who, at the time of his election, is not a citizen of the United States; nor any one who has not been for two years next preceding his election, an inhabitant of this State, and, for one year next preceding his election, an inhabitant of the district whence he may be chosen. Senators shall be at least twenty-five, and Representatives at least twenty-one years of age.

Thus, if this Court does not resolve this appeal during this Term, and the lower court's order is not stayed, grave questions could arise regarding the effect of this state constitutional provision on the validity of any electoral districts which might have to be created less than one year from the November, 1986 elections.

11. Appellants respectfully state that they must either have a decision on the merits of this appeal during this Term, or the lower court's order must be stayed. By memorandum dated March 25, 1985, the Clerk of this Court has advised counsel that unless expedited by the Court, this case will probably be heard in the October Term, 1985. Counsel have been informally advised by telephone that oral argument will likely be scheduled for the month of October. The possibility thus exists that unless expedited, this appeal may not be decided in time to allow the Indiana General Assembly to act, if necessary, pursuant to the Court's guidance even before the May 6, 1986 primary or the March 7, 1986 filing deadline (Ind. Code §§3-1-9-4, 5).[1] In addition, it is likely that vacancies will occur in legislative districts, prior to the 1986 elections. Unless the lower court's order is stayed, such vacancies in the presently constituted districts could not be filled until 1986, leaving the citizens in such districts unrepresented in the meantime.

---

[1] The Indiana General Assembly is a citizen legislature which is only in session for a limited period of time each year. In odd-numbered years it meets in regular session for a maximum of 61 session days, beginning in January and ending no later than April 30. Ind. Code §2-2.1-1-2. In even-numbered years it meets in regular session for a maximum of 30 session days. Ind. Code § 2-2.1-1-3.

12. Members of this Court have previously recognized the irreparable harm which can occur absent a stay in cases involving elections and the political process. In Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers) Justice Brennan concluded that the state would suffer irreparable harm from a forced redistricting pending appeal:

> As to the third Rostker requirement, I conclude that applicants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect that the District Court will implement its own redistricting plan. With respect to the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans.
>
> Id. at 1306-07.

Similarly, Indiana would suffer the harm recognized by Justice Brennan were the General Assembly forced to adopt an alternative redistricting plan prior to the decision by the Court on this appeal. Regarding potential candidates who might be affected by the Indiana constitutional provision, Justice Black determined in Davis v. Adams, 400 U.S. 1203 (1970) (Black, J., in chambers) that unconstitutional deprivation of the right to run for office constituted sufficient irreparable harm to justify a stay. See also Whitcomb v. Chavis, 396 U.S. 1055, 1064 (1970) (granting and refusing to vacate or modify a stay).

13. The balance of equities in this case, including the interests of the public, Rostker v. Goldberg, 448 U.S. 1306 (1980) (Brennan, J., in chambers), clearly favors the granting of a stay if an expedited decision cannot be obtained. The potential harm to the state, to potential candidates for office, and to the state's voters absent a stay has been discussed above. Appellees will suffer no harm from entry of a stay. Justice Powell has previously pointed out that merely

"prolonging" the remedy sought by Appellees is not a basis to deny a stay. Wise v. Lipscomb, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers). Significantly, the lower court allowed the November, 1984 general elections to proceed under the current reapportionment acts, and this Court has approved the interim use of reapportionment acts found invalid to avoid disruption of the election process. See, e.g., Reynolds v. Sims, 377 U.S. 533, 585 (1964). The public also has a considerable interest in allowing the plan of apportionment formulated by their elected representatives to remain in effect pending this appeal, Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers); Gaffney v. Cummings, 412 U.S. 735 (1973), and in allowing the state's political process to function free of judicial supervision, O'Brien v. Brown, 409 U.S. 1 (1972).

WHEREFORE, in the event this Court does not wish to expedite consideration of this appeal, Appellants respectfully apply for an order staying the December 13, 1984 order of the three-judge panel sitting in the Southern District of Indiana pending a final disposition of the appeal to this Court.

Respectfully submitted,

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*Counsel of Record for Appellants

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